the child happens to be should give effect to the foreign judgment without further enquiry only when it is in the best interest of that infant that the court should not look beyond the circumstances in which the foreign jurisdiction was invoked. It is the law of this country as it is the law of India that the welfare and happiness of the infant must be the paramount consideration in child custody adjudication. Consequently, although our courts must take into consideration the order of a foreign court of competent jurisdiction, we are not bound to give effect to it if this would not be for the infant's benefit. We cannot regard that order as rendering it in any way improper or contrary to the comity of nations if the courts in this country consider what is in his best interest. Such an order cannot from its nature be final or irreversible. It is only of persuasive authority.

We are satisfied the learned judge erred in the exercise of his discretion as his determination arose from an error of law. In view of the manner in which he approached his decision, we are unable to determine whether the conclusion reached by him served the best interest of the infants and we would add that this is not a case where this court should substitute its own findings for that of the learned trial judge.

We are of the opinion that the learned judge was also wrong in law in coming to the conclusion that on the merits the father could not succeed. He said that if at all there was any allegation of change in the circumstances, it was only an allegation that the infants had expressed their strong decision to remain in Malaysia under the father's custody, an allegation to which he attached little importance. Change of circumstances, in our view, may be brought into the picture to reverse a previous decision of the same court, even though differently constituted. In such a case the matter is never *res judicata*. A custody order is not final and conclusive. If any change has taken place in the circumstances of the parties which warrants a reconsideration of the matter, the court is not bound by a former order, but, will use its discretion with respect to the altered conditions, always bearing in mind the fact that the welfare and happiness of the infants are the paramount considerations.

We echo the statement of the law by Widgery J., (as he then was) in *Robinson* v. *Williams*[3]:

"The cases all now show that the fact that justices have refused to make an order in favour of the mother on an earlier occasion does not create any estoppel in the event of her seeking to obtain an order against the same man on a subsequent occasion. It is quite clear that the facts are not res judicata and there is no provision in any statute which requires either that fresh evidence or additional evidence should be produced on a second or subsequent application. In my judgment the only reason why fresh or additional evidence is required in practice is the reason given by Oliver J. at the end of his judgment in *Rex* v. *Sunderland Justices, Ex parte Hodgkinson*, [1945] K.B. 502, 509; 'It is unthinkable that, on the same facts and on the same evidence, the same tribunal, though perhaps differently constituted, should be invited to reverse a previous decision of its own.' If the justices are invited in effect to reverse a previous decision of their own upon the same grounds and the same evidence, they would obviously take the direction of Oliver J. But if the evidence is different in the sense that it raised different considerations and justifies a reassessment, it seems to me proper for the justices to embark upon a second consideration of the matter."

Despite the mass of affidavit evidence, there is little information of the infants who are the central figure in the case. It has always been accepted that judges are entitled to see the infants and each of the parents in private. That was not done in this case. We feel that there should be comprehensive information; information not only dealing with the merit or otherwise of the parents involved in the dispute, but also information related to the infants. Only after a hearing in which all the aspects of the case had been gone into would he been able to arrive at a firm finding as to what are for their benefit. Anything short of this would leave the father with the smarting feeling of injustice.

We propose to deal with this appeal on the basis suggested by Lord Scarman in *B.* v. *W.*[4] that where the Court of Appeal is satisfied that the order was wrong but unsure on the evidence what order ought to be made, the court can remit the case to another judge with such directions for the care and control of the child in the meantime as it thinks best in the children's interest.

The appeal must be allowed and the proceedings remitted for a rehearing before another judge. Our decision to allow the appeal is on a point of law only and it does not relate to the substantive merit of the case. Pending further order the custody of the infants will remain with the fatner. The mother is to have access to the infants on terms to be agreed upon between the parties.

Appeal allowed.

Solicitors: *Zain & Co.; Skrine & Co.*

SUN KEE & CO. v. CHOP SIN HUA HIN & ANOR.

[F.C. (Raja Azlan Shah C.J., Abdul Hamid F.J. & Abdoolcader J.) May 20 & July 23, 1981]

[Kuala Lumpur — Federal Court Civil Appeal No. 70 of 1980]

Practice and Procedure — Execution of judgment — Order for sale of land by public auction — Application to restrain sale — R.S.C., 1957, O.43 r.11.

In this case the first respondent had obtained judgment against the appellant and subsequently obtained an order for the sale of lands belonging to the appellant by public auction. On the day the sale was fixed the appellant applied for an injunction to restrain the sale. The sale however proceeded and the lands were sold to the second respondent. The appellant thereupon applied for an order for the sale to be set aside. This application was dismissed in the High Court and the appellant appealed. The appellant contended *inter alia* (1) that the reserve price should not have been disclosed; (2) that no provision was made for the two lots of land to be offered for sale separately; and (3) the reserve price fixed was below the market value of the lands.

Held, dismissing the appeal: (1) the incorporation of the reserve price in the order and the fact that the two lands were not directed to be sold separately were not irregularities which could vitiate the sale. The appellant could have urged an order in those terms but as he did not do so, it must be taken that he was willing to let the summons for sale go by default or implied consent;

(2) there was in the circumstances no justification for any complaint with regard to the reserve price fixed.

FEDERAL COURT.

Dato Morris Edgar for the appellant.

Chin Yew Meng for the respondent.

Cur. Adv. Vult.

Abdoolcader J. (delivering the judgment of the Court): A summons for directions for the sale by public auction of 2 contiguous lots of land in the District of Kuala Lumpur belonging to the partners of the appellant firm and against which a prohibitory order attaching them in an application for execution had been granted on September 7, 1979 by consent was taken out on November 6, 1979 by the 1st respondent which as plaintiff in the substantive action had obtained judgment against the appellant for a monetary sum but leaving a balance still payable in the region of some $140,000 inclusive of interest and costs. The summons was served on the appellant's solicitors and copies of a valuation report dated December 10, 1979 by a reputable firm of international real estate agents and valuers, Jones Lang Wootton, valuing the property sought to be sold at a forced sale value of $270,000 were sent to the Senior Assistant Registrar of the High Court and the appellant's solicitors on December 11, 1979. There was no protest on behalf of the appellant against the valuation disclosed nor did their solicitors attend before the Senior Assistant Registrar at the hearing of the summons on January 11, 1980 when an order was accordingly made for the sale of the lands in question by public auction on March 17, 1980 at a reserve price of $270,000 in accordance with the valuation report tendered, with the necessary consequential directions. A copy of the Order was served on the appellant's solicitors under cover of a letter dated February 6, 1980.

It was only on March 17, 1980 that the appellant took out a motion returnable that very day on which the sale was fixed for 10.30 a.m. to restrain the sale, to quote, 'by injunction until the decision is made by this Honourable Court on an Application to be filed forthwith.' We need only observe with regard to this application that this is hardly the diligence one would have expected in the circumstances when the appellant and their solicitors knew of the Order made on January 11, 1980 and there was furthermore prominent publication of the proclamation of sale more than 4 weeks before the date of the sale pursuant to the terms of the Order, quite apart from the fact that the 2 valuation reports the appellant now seeks to rely on date as far back as March 1979 and January 1980. According to an affidavit made by the managing partner of the appellant, all the judges were attending the opening of Parliament in the morning of March 17, 1980 and the appellant's motion could not therefore be heard and the sale accordingly proceeded pursuant to the Order of January 11, 1980 when the 2 lots were purchased by the 2nd respondent for $275,000. The appellant then filed a motion on March 20, 1980 returnable on March 24, 1980 for an Order for the sale to be set aside which Mohamed Azmi J., heard and dismissed on that day. The appellant appealed against that decision.

The appellant's complaint basically and primarily is that the reserve price should not have been disclosed in the Order of January 11, 1980 and also that no provision was made for the 2 lots to be offered for sale individually and in a specified order as provided for by section 257(2) of the National Land Code (the 'Code'). They further contend that there has been non-compliance with the provisions of section 257(1)(d) of the Code which stipulate for the reserve price fixed for the purpose of the sale to be a price equal to the estimated market value of the lands in question and rely on 2 valuation reports they had obtained from two other valuers showing the value of the lands as $360,000 at March 19, 1979 and $495,000 at January 11, 1980 respectively which substantially exceed the reserve price fixed by the Senior Assistant Registrar.

At the outset of the hearing of this appeal Dato Morris Edgar for the appellant had perforce to concede in answer to a query we raised that section 257 of the Code has no application in this matter. It is clear from the provisions of Chapter 3 of Part Sixteen in Division IV of the Code and in particular section 256(2) and (3) that section 257 only applies to an order for sale at the instance of a chargee of land. The statutory provision that would apply and govern the sale of the lands in question in the matter before us is Order 43 rule 11 of the Rules of the High Court, 1957, the material part being paragraph (e) thereof which provides (so far as material for the present purposes) that any person whose interests are affected by the sale may apply to the court or a judge to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it.

The incorporation of the reserve price in the Order of January 11, 1980 is not an irregularity which would vitiate the sale nor indeed, quite apart from the provisions of section 257(2) of the Code which do not apply and which in any event are only directory and discretionary, is the fact that the 2 lands were not directed to be sold separately. If that was the proper course in the circumstances of this case a direction to that effect could have been urged and sought on cogent grounds at the instance of the appellant but the appellant's solicitors deliberately chose not to attend before the Senior Assistant Registrar when the summons was heard and the Order made despite the service of the summons on them. No excuse has been or indeed perhaps can possibly be advanced for this absence and it might therefore well be taken to amount to a willingness to let the summons for sale go by default or implied consent.

This left Dato Edgar with the only argument open to him, *scilicet* the question of the reserve price not reflecting the estimated market value of the lands and he of course relied on the 2 valuation reports the appellant had obtained and which we have earlier referred to. The Senior Assistant Registrar at the time he made the Order on January 11, 1980 had before him only the valuation of Jones Lang Wootton tendered by the 1st respondent and made by a reputable firm of valuers which he could not have any reason to doubt and, it will be noted, was specifically made on the basis of valuation for a sale of the lands by auction. The March 1979 valuation report now relied on by the appellant clearly states that it was prepared on the instructions of and for the appellant and was intended for submission to their bankers for financing purposes, and so too with the other valuation report of January 1980 in support of the appellant's contention on the question of market value which specifically states that the valuation was made for

mortgage purposes. These 2 valuation reports therefore were prepared to estimate the value of the lands in question as security for the purpose of obtaining finance. We cannot but therefore wholly endorse the learned judge's assessment of the 3 valuation reports produced in this matter and his finding in the circumstances that the reserve price of $270,000 was a fair estimate of the market value of the lands based on the valuation by Jones Lang Wootton which he found to be more reliable than the other two. There is therefore no justification for any complaint with regard to the reserve price fixed. In any event, in taking the passive and supine attitude the appellant did in not protesting against the valuation made by Jones Lang Wootton at the proper time when they had ample opportunity to do so they acted to their own detriment and at their peril and there is no reason why the 2nd respondent as the purchaser at a properly conducted sale should suffer as a result of their default which it would not be inapposite to categorize as wilful.

The argument for the appellant was so feeble and inevitably so brief that there was hardly anything for the respondents to answer. At the end of the day, and an extremely short one at that, we did not have to call upon counsel for the respondents and accordingly dismissed this appeal with costs and directed the deposit in court by way of security to go to the respondents to account of their taxed costs.

Appeal dismissed.

Solicitors: *Morris Edgar & Clough Thuraisingham; Allen & Gledhill.*

HAMZAH BIN ABDUL GHANI v. VERGHESE THOMAS

[O.C.J. (Mohamed Azmi J.) June 19, 1979]

[Kuala Lumpur — Civil Suit No. 2182 of 1976]

Damages — Quantum — Spine and multiple injuries — Wedge-compression fracture — General damages awarded $22,000.

The plaintiff in this case was a twenty year old despatch clerk. He suffered the following injuries as a result of a motor accident: pain in the spine and chest, a small laceration over the left eye-brow, wedge-compression fractures of the second, third and fourth lumbar vertebrae, and a fracture of the right ischiopubic ramus. He was hospitalized for 12 days. Liability was found to be 50:50. There was no claim for special damages.

Held: (1) general damages was assessed as follows: (1) laceration and permanent scar over left eye-brow $800, (2) wedge-compression fracture of 3 lumbar vertebrae with residual deformities $18,000, (3) fracture of right pelvis $4,500, (4) osteoarthritic changes $2,000. The total sum was $25,300;

(2) the learned judge taking into consideration the element of overlapping, the award was reduced to $22,000. General damages was apportioned on a 50:50 basis.

Cases referred to:-

(1) *Seet Kim Neo* v. *Yong Kim Sun* [1968] 2 M.L.J. xxii.

(2) *Tan Jack* v. *Chung Sow Chan, Dass* on Quantum in Accident Claims @ 401 *(unreported).*

(3) *Ng Cheng Hoe* v. *Tan Kai Boon, Dass* on Quantum *in Accident* Claims @ 403 *(unreported).*

(4) *Foo Chik Seow* v. *Hashim bin Abdul Hamid & Ors., Dass* on Quantum in Accident Claims @ 404 *(unreported).*

(5) *Appandurai* v. *Lim Puk Tow, Dass* on Quantum in Accident Claims @ 402 *(unreported).*

(6) *Wong Kum Peng* v. *Ngieng Kim Heek* [1965] 2 M.L.J. viii.

(7) *See Ong Lim* v. *Changi Bus Co. Ltd.* [1966] 1 M.L.J. xxxiv.

(8) *Ng Shin Hon* v. *Chow Wai Chuang* [1968] 1 M.L.J. 37, 39.

(9) *Woon Joke Buay* v. *Chan Eng Kian* [1968] 1 M.L.J. xliii.

(10) *Chang Go Yang* v. *Koh Han Tong* [1972] 2 M.L.J. lviii.

(11) *Paramsivam & Anor.* v. *Abdul Aziz & Ors.* [1976] 2 M.L.J. 91, 92.

CIVIL SUIT.

R.K. Nathan for the plaintiff.

Yaacob Sodhy for the defendant.

Cur. Adv. Vult.

Mohamed Azmi J.: This is a claim for damages for personal injuries and consequential loss sustained by the plaintiff from a road accident that occurred along Persiaran Swettenham, Kuala Lumpur, on July 4, 1974 at about 5.00 p.m. The plaintiff was riding motorcycle BE 8475 from the direction of Jalan Damansara towards Jalan Duta when a collision occurred with motor car AL 6725 driven by the defendant from the opposite direction. On the pleadings, the defendant denies liability and he also counterclaims $1,264.69 as special damages in respect of his damaged car.

From the statement of agreed facts, the collision between the two vehicles is not disputed. It is further agreed that as a result of the accident, the plaintiff suffered injuries as shown in the medical report dated August 5, 1975 (AB1).

During the trial, liability is agreed by the parties on a 50/50 basis. On that basis, special damages for the plaintiff's actual loss of earning was agreed at $400, and the sum of $425 was also agreed in respect of the defendant's counterclaim. The only issue for determination is on the plaintiff's claim of general damages for pain and suffering and loss of amenities. There is no claim for loss of future earnings and loss of earning capacity.

As the issue is only confined to the quantum of general damages for pain and suffering and loss of amenities, both parties did not call any witness and they rest their case on submissions based on the pleadings, statement of agreed facts and the six documents in the agreed bundle of documents (AB1 to AB6).

In assessing damages for pain and suffering and loss of amenities, I take into consideration the fact that the plaintiff is a young man of twenty years working as a Despatch Clerk. He was taken to the Accident Unit of the University Hospital after the collision. He suffered pain in the spine and chest although he was not in shock. A small laceration was found over the left eye-brow. The spine was rigid and tender. X-rays showed wedge-compression fractures of the second, third and fourth lumbar vertebrae, and a fracture of the right ischiopubic ramus. He did not suffer any kidney injury or neurological